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KHOO KEAN SOON

v.

CHAN TAI HUAT

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HIGH COURT MALAYA, PENANG
JOHN LOUIS O'HARA J
[CIVIL APPEAL NO: 12-106-2005]
12 JUNE 2008

C ***ROAD TRAFFIC:*** *Negligence - Motor car collided into motorcyclist from behind - Trial judge found driver of motor car not liable - Whether trial judge erred on facts and evidence*

DAMAGES: *Quantum - Special damages - Cost of care - Loss of*
D *earnings - Urine bags and napkins - Whether multiplier and multiplicand used by trial judge reasonable*

This was the plaintiff's appeal against the finding by the sessions court judge ('SCJ') on quantum and liability where the SCJ found the defendant not liable for an accident involving the plaintiff's
E motorcycle and the defendant's motorcar as a result of which the plaintiff had become bedridden. The plaintiff's main argument was that the SCJ erred in concluding that a collision had not occurred between the said vehicles.

F **Held (dismissing the appeal):**

(1) Apart from the plaintiff's evidence there were no eye witnesses to the accident. The plaintiff's evidence as to where and when he lost consciousness was contradictory. It
G was pertinent to note that the plaintiff did not state in evidence as to who collided into his motorcycle. Moreover the site of the accident as stated in the defendant's report differed from that stated by the plaintiff. It was also relevant to note that there was a record of "an alleged fall from
H motor bike today" in the course of the doctor's examination of the plaintiff at the relevant hospital. The plaintiff's police report too was lodged some two months later than the defendant's police report. (paras 4, 5 & 6)

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(2) The plaintiff's contention that the SCJ failed to give due weight to the silent evidence of the investigating officer ('IO') was without basis because the SCJ did consider the photographs and other aspects alluded to by the IO. (para 7)

(3) The SCJ failed to consider the defendant's police report as proof that he had collided into the plaintiff's motorcycle because the said report was tendered for identification purposes and never formally produced as an exhibit. Also, no where in the report did the defendant mention the plaintiff's motorcycle. (para 8)

(4) The IO's investigation was minimal, superficial and cursory as disclosed by his evidence in court. He visited the purported scene of the accident 21 hours after the defendant's police report was lodged and 36 hours after the alleged time of the accident. He did not know the registration number nor the name of the rider allegedly involved in the collision and only got to know the information after the plaintiff's police report was lodged two months later. Up to the time of the accident, he did not know where the motorcycle supposedly involved in the collision was. He also could not tell the actual site of the alleged collision. He agreed that if both vehicles had been sent to the Chemistry Department it would be known if they had been involved in the collision. He never prepared a sketch nor took photographs of the site. Furthermore, when shown the photograph of the motorcar, he agreed that there was no dent in the front of the motorcar. Yet, in spite of all his errors and omissions, he concluded that there was a collision. In the circumstances, the conclusion of the IO was viewed as being suspect. (para 9)

(5) There was no basis whatsoever to infer negligence on the part of the defendant based on the damage to the defendant's car because the said damage only showed minimal damage to its front number plate. (para 10)

(6) The plaintiff's contention that the SCJ erred in law and fact by failing to consider the plaintiff's evidence that he was riding the said motorcycle when he was collided into by the defendant was unfounded and totally unsubstantiated by the

A evidence. The plaintiff himself had stated in evidence that he did not know the number of the vehicle that collided into him. The plaintiff failed to realise that the burden of proof lies on him on a balance of probabilities and that the SCJ rightly held that he had failed to discharge that burden. B (paras 11 & 12)

(7) There was no evidence to suggest that the motorcycle that the defendant collided into was that of the plaintiff's. The defendant's police report was insufficient to prove that the C defendant had collided into the plaintiff. The findings of the investigating officer that there was a collision between the defendant's motorcar and plaintiff's motorcycle was suspect because the facts did not convince the court that a collision had in fact taken place between the defendant and the D plaintiff. (para 13)

(8) The non-appearance of the defendant was inconsequential to the case since the plaintiff did not put forth sufficient evidence to prove his case on a balance of probabilities therefore negating the need for the defendant to rebut the E plaintiff's case. (para 13)

(9) The SCJ rejected the plaintiff's claim for nursing care because the plaintiff did not receive his care in a nursing home. However, she allowed the costs of care at RM500 per F month at a multiplier of 65 years take away 34 years at the time of accident which equaled to 31 years. She then halved the 31 years for contingencies to arrive at a figure of 15.5 years. The total figure arrived at was therefore 15.5 x 12 x RM500 which resulted in RM93,000. Her reason for not G awarding cost of care instead of nursing care was sound and in line with the reasoning in the case of *Mokhtarudin Abdullah & Anor v. Norizan Rosdi & Ors*. Also, the plaintiff's mother had stated in evidence that she would pay someone to take care of the plaintiff if compensation was given. She did not H say that she would entrust his nursing care to a nursing home. The multiplier and the multiplicand used by the SCJ were reasonable in the circumstances. (para 14)

(10) The SCJ rightly rejected the plaintiff's claim calculated at I RM1,500 x 12 x 10.5 = RM198,000 for loss of earnings. She was not satisfied with SP2's evidence that he paid the plaintiff RM1,500 per month to collect debts on his behalf.

There was no documentary proof to support SP2's assertion and as SP2 was the plaintiff's brother, the SCJ was justified in her caution when evaluating SP2's evidence. However, she allowed loss of earnings in regard to his employment with Espirit Empire calculated at RM2,900 x 12 x a multiplier of 10.5 years (55 years – 34 years divide by 2) which resulted in RM365,400. (para 14)

(11) Even though the plaintiff's evidence in support for urine bags and napkins was lacking, the SCJ was prepared to award RM500 per month x 15.5 years which equaled to RM93,000. There was no error of fact or law in the multiplicand and multiplier used by the SCJ. (para 14)

(12) The SCJ had not misdirected herself in regard to the facts or law, the burden of proof and the standard of proof. She had carefully and painstakingly considered the oral evidence, the evidence of the investigating officer as well as the silent evidence discernable from the investigating officer's evidence and attached appropriate weight to particular aspects of the evidence. She considered the submissions of the parties and her conclusions were amply supported by evidence. Based on the appeal records and in particular the SCJ's grounds of judgment, there were no reasons or grounds to allow the plaintiff's appeal. (para 22)

Addendum

SCJ's award on quantum and damages:

(Tan Hooi Leng SCJ; *Khoo Kean Soon v. Chan Tai Huat*; Summons No 53-356-2003; Sessions Court, Pulau Pinang)

General damages

(1) Subluxation of the C3/C4 cervical vertebra with spinal cord contusion resulting in quadriplegia: RM210,000

Special damages

(1) GMC medical bill: 1/3 of RM30,060.71

(2) General Hospital medical bill: RM196

(3) Transport costs: RM1,680 (56 days @ RM30 per day)

(4) Cost of care: = RM93,000 (multiplier 65 years take away 34 years at the time of accident = 31 years and divided by 50% contingency equals 15.5 years; RM500 per month x 12 months x 15.5 years)

(5) Loss of earnings: RM365,400 (RM 2,900 x 12 months x multiplier 10.5 years (55-34 years divided by 1/2))

(6) Costs of buying napkins and urine bags: RM93,000 (RM500 per month x 12 months x 15.5 years)

(7) Costs for police report: RM20; JPJ report: RM20; Hospital Pulau Pinang report: RM40, GMC report: RM130; payments made to Howe Cheong Medical Supply: RM220, Northern Medical Supplies Sdn Bhd: RM780, Penang Medical Supplies: RM892.50.

Case(s) referred to:

Ahmad Nordin Hj Maslan & Anor v. Eng Ngak Hua & Ors [1985] 1 LNS 49 SC ***(refd)***

Clarke v. Edinburgh Tramways Co [1979] SC (HL) 35 ***(refd)***

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal [1997] 3 CLJ 189 CA ***(refd)***

MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 ***(refd)***

Mohamed Mat Amin & Ors v. Mohd Rabu Ihsan [2002] 5 CLJ 47 HC ***(refd)***

Mokhtarudin Abdullah & Anor v. Norizan Rosdi & Ors [1998] 1 LNS 248 ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 123 ***(refd)***

Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh [1997] 3 CLJ 225 CA ***(refd)***

Rubiah Anuar v. Lim Sang [1998] 3 CLJ Supp 314 HC ***(refd)***

Samar Mansor v. Mustafa Kamarul Ariffin [1974] 1 LNS 147 ***(refd)***

Tan Cheong Poh & Anor v. Teow Ah Keow [1996] 3 CLJ 665 CA ***(refd)***

For the appellant - T Jegathesan (Saravana Kumar with him); M/s Jega Kumar & Partners

For the respondent - VK Dasaratharaj (Tang Khye Kian with him); M/s VP Nathan & Partners

[Editor's note: Plaintiff's appeal to Court of Appeal vide Civil Appeal No: P-04-84-2007 was dismissed with costs on 11 December 2008.]

Reported by Usha Thiagarajah

JUDGMENT

Introduction

[1] This matter came before me as an appeal by the plaintiff against the decision of the Sessions Court Judge Georgetown, delivered on 25 April 2005 in regard to quantum and liability wherein she found the defendant not liable for the accident in which the plaintiff was rendered bedridden.

Liability

[2] The main thrust of the appeal as regards the issue of liability was that the Sessions Court Judge was wrong in coming to the conclusion that a collision had not occurred between the plaintiff's motorcycle PFH 3807 and the defendant's motor car PEB 5432.

[3] Let me then evaluate this general finding of the Sessions Court Judge and certain other more specific findings in the light of the evidence adduced by the plaintiff. In all the plaintiff called a total of ten witnesses. The plaintiff's main argument is:

a) That the defendant was bound by his pleadings in that he had in his statement or defence pleaded "that a collision had occurred between his car and a motorcycle"

b) That the motorcycle was in fact the plaintiff's motorcycle;

c) That the collision was in fact caused by the negligence of the defendant; and

d) That the plaintiff was not negligent.

[4] Apart from the plaintiff's evidence there were no eye witnesses to the accident. The plaintiff (SP9) in his evidence stated that at 4.30am on 15 January 2003 a motor car collided into him from behind. The plaintiff's evidence as to when and where he lost consciousness is contradictory to say the least. However it is pertinent to note that the plaintiff never in his evidence states as to who collided into his motorcycle. Moreover the site of the accident as stated in the defendant's report differs from that alleged by the plaintiff.

[5] It is also relevant to bear in mind that Dr. Khor Siok Hoon (SP7) the Deputy Director of the Penang General Hospital who produced the card prepared when the plaintiff was admitted on

15 January 2003. On the card was chopped "AOR discharged" and signed by SP1, the plaintiff's father. Furthermore in the course of examining the patient there was a record of an "alleged fall from motor bike today".

[6] The Investigating Officer (IO) SP4 testified as to the sequence of the police reports that were lodged; the first report 933/03-(ID15) was made on 15 January 2003 at 7.30pm by the defendant. The second report No. 4259/03 was lodged almost two months later on 11 March 2003 at 12.25pm by SP1, the plaintiff's father.

[7] The plaintiff's contention that the Sessions Court Judge had failed to give due weight to the silent evidence of the IO, SP4, is without basis because the Sessions Court Judge did consider the photographs and other aspects alluded to by the IO, SP4.

[8] The plaintiff's contention that the Sessions Court Judge had failed to consider the defendant's Police Report ID 15 as proof that he had collided into the plaintiff's motorcycle can be answered as follows:

1. The report was tendered for identification and never formally produced as an exhibit; and

2. Even if the court were to consider its contents, no where in the report does the defendant mention the plaintiff's motorcycle.

[9] To cut a long story short, SP4's investigation was minimal, superficial and cursory as was disclosed by his evidence in court. He visited the purported scene of the accident at 4.30pm on 16 January 2003, 21 hours after the report 933/03 was lodged and 36 hours after alleged time of accident stated in report 933/03. He did not know the registration number of the motorcycle nor the name of the rider allegedly involved in the collision stated in report 933/03 and only "got to know" of this information when report 4259/03 was lodged. In addition he testified that up to the time of giving evidence in court he did not know where the motorcycle supposedly involved in the collision was. He even stated that the collision occurred near a junction but he could not tell for sure the actual site of the alleged collision. As earlier mentioned, the spot where the plaintiff says the accident occurred differs from that where the defendant says in his report he grazed

a motorcycle. SP4 agreed that if both vehicles had been sent to the Chemistry Department it would be known if they had been involved in the collision. He never prepared a sketch plan or took photographs of the site. Furthermore when shown photograph ID14, SP4 agreed that the car in the photograph "tiada kemek di hadapan". Yet in spite of all SP4's errors and omissions he concluded "Berpandu pada laporan dan siasatan kedua-dua kenderaan ada terlibat". In view of the above this court views this conclusion of SP4 as being suspect.

[10] The plaintiff further contended that the Sessions Court Judge had failed to consider that the damage to the defendant's car showed that the collision stemmed from the defendant's negligence. This court found absolutely no basis whatsoever to infer negligence on the part of the defendant, more so since defendant's car only shows minimal damage to its front number plate.

[11] The plaintiff argues in his memorandum of appeal that the Sessions Court Judge erred in law and fact by failing to consider the plaintiff's evidence that he was riding motorcycle PFH 3807 and was collided into by the defendant. This rather baseless contention is unfounded and totally unsubstantiated by the evidence. To quote the plaintiff (SP9):

> Saya setuju saya tidak tahu nombor kenderaan yang langgar saya.

[12] The plaintiff fails to realize that the burden of proof lies on him on a balance of probabilities and that the Sessions Court Judge rightly held that he had failed to discharge this burden.

[13] In addressing the question of liability the Sessions Court Judge has painstakingly addressed the following sub-issues to the satisfaction of this court. These were:

a) The issue that the defendant had admitted colliding into a motorcycle and therefore was bound by his pleading –

   while this may be so there just was not one iota of evidence to suggest that the motorcycle that he had collided into was the plaintiff's;

b) The issue whether the defendant's police report ID15 was sufficient to prove that the defendant collided into the plaintiff –

this has been answered by the Sessions Court Judge:

1. To the effect that ID15 remained a document for identification purposes; and

2. That no where in the report is there a reference to the plaintiff.

c) The issue pertaining to the finding of the IO, SP4 that there was a collision between the defendant motor car and plaintiff's motorcycle –

the short answer is to be found in the last paragraph of the Sessions Court Judge's, grounds of judgement wherein she rightly held that the facts, if considered together do not convince the court that a collision did in fact occur between the defendant and the plaintiff; and

d) The issue pertaining to non-attendance of defendant –

the Sessions Court Judge distinguished the authorities referred to by the plaintiff ie, *Mohamed Mat Amin & Ors v. Mohd Rabu Ihsan* [2002] 5 CLJ 47, *Rubiah Anuar v. Lim Sang* [1998] 3 CLJ Supp 314 and *MA Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73. Now the Sessions Court Judge hinted that the absence of the defendant was to assist the plaintiff. Be that as it may, this court, while finding that the inference drawn by the Sessions Court Judge was irrelevant, uncalled for and unsubstantiated by the evidence, finds the non appearance of the defendant to be inconsequential for the plaintiff had not put forth sufficient evidence to prove his case on a balance of probabilities therefore negating the need for the defendant to rebut the plaintiff's case.

Quantum

[14] The plaintiff appeal in regard to quantum was in regard to special damages and focused on the following heads:

a) Nursing Care

The Sessions Court Judge rejected the plaintiff's claim for nursing care because the plaintiff did not receive his care in a nursing home. She however allowed the cost of care at RM500 per month at a multiplier of 65 - 34 = 31 years which

she then halved for contingencies to give a figure of 15.5 years. The total figure arrived at was therefore 15.5 x 12 x RM500 = RM93,000. Her reason for awarding cost of care instead of nursing care is sound and in line with the reasoning in *Mokhtarudin Abdullah & Anor v. Norizan Rosdi & 2 Ors* [1998] 1 LNS 248 and was because the plaintiff's mother, SP5 stated in evidence that if compensation was paid she would pay someone to take care of the plaintiff. She did not say that she would entrust his nursing care to a nursing home.

The plaintiff argued that the Sessions Court Judge should have awarded damages for "nursing case" calculated at 36 years at RM1,400 per month without any deduction for contingencies. However in reply the plaintiff put forth a formula of RM1,400 per month for 24 years.

The multiplier and multiplicand which the Sessions Court Judge used were reasonable in the circumstances – see *Ahmad Nordin Hj Maslan & Anor v. Eng Ngak Hua & Ors* [1985] 1 LNS 49 SC and *Tan Cheong Poh & Anor v. Teow Ah Keow* [1996] 3 CLJ 665.

b) Loss Of Earnings

The Sessions Court Judge rightly rejected the plaintiff's claim for RM1,500 x 12 x 10.5 = RM198,000 as she was not satisfied with SP2's evidence that he paid the plaintiff RM1,500 per month to collect debts on his behalf. There was no documentary proof to support SP2's assertion and as SP2 was the plaintiff's brother the Sessions Court Judge was justified in her caution when evaluating SP2's evidence.

She however did allow loss of earnings in regard to his employment with Espirit Empire calculated at RM2,900 x 12 x multiplier of 10.5 (55 - 34 divide by 2) = RM365,400.

c) Urine Bags & Napkins

Even though the plaintiff's evidence in support of these two heads was lacking, the Sessions Court Judge was prepared to award RM500 per month x 15.5 years giving a total of RM93,000. I can see no error of fact or law in the multiplicand and multiplier used by the Sessions Court Judge.

The plaintiff asked for RM500 per month x 12 x 36 years but subsequently argued for 24 years. The difference was because of the figure allowed as life expectancy. The defendant disputed the award for urine bags and napkins arguing that neither was their need not specially mentioned in the specialist report nor was there proof that the plaintiff was actually using these items. However while the defendant argued that the multiplier should be 10.5 years and not 36 years as claimed by the plaintiff, he was prepared to accept a multiplier of 15.5 years.

Role Of Respective Courts

[15] The roles assigned to the trial court and to the appellate court was clearly and concisely elucidated by Sri Ram JCA, in *Renal Link (KL) Sdn. Bhd v. Dato' Dr. Harnam Singh* [1997] 3 CLJ 225 where his Lordship at p. 379 had this to say:

> In our judgement, this appeal really turns upon a pure question of fact based upon the credibility of the witnesses who gave their evidence at the trial. The function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. Unless we, as a court of appeal, are convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us to intervene and upset the findings made by a trial judge.

[16] In *Pekan Nenas Industries Sdn. Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793 at pp. 825-826 Edgar Joseph Jr CCA, state:

> In considering this appeal, we think it is right to say, at the risk of being trite, that like the Privy Council, we adhere to the principle that a trial Court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses so that we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so (See *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18).

[17] Way back in 1974 Raja Azlan Shah FJ stated the following in *Samar binte Mansor v. Mustafa Kamarul Ariffin* [1974] 1 LNS 147:

> It is axiomatic that a finding of negligence though involving matters of inference is properly regarded as a finding of fact. For an appellant to succeed in an appeal against a finding of fact made by a single judge, he must convince the appellate court that the learned judge was wrong in his conclusion. That the appeal may be by way of re-hearing does not alter the situation. A hearing is not, however, a retrial of the issues. The question is not whether an appellate court can substitute its view of the facts which of course it is empowered to do so, but whether it should do so. However much an appellate court may be in an equal position with the trial judge as to the drawing of inferences, it ought not to reverse the finding of fact unless it is convinced that it is wrong. It is not whether the inferences are right but whether an appellate court is convinced that they are wrong. If that finding is a view reasonably open on the evidence, it is not enough to warrant its reversal just because an appellate court would have come to a different view. Merely differing views do not establish that either view is wrong, but in balancing these two views an appellate court should give due weight to the nature of the fact as found by the trial judge.

[18] Likewise Wan Sulaiman FJ in *Rasidin b Partorjo v. Frederick Kiai* [1976] 1 LNS 123 stated that:

> A Court of Appeal always starts with the working presumption that any decision appealed against is right in every respect. So to succeed in an appeal the appellant must convince us that the decision appealed from is wrong. If we are not so convinced, the appeal fails.

> The principle upon which an appellate court will interfere with an award of damages made by a judge sitting alone has been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd (2)* at pages 616-7 as follows:

> > Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v. Lovell.* In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or

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> has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

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Thus the appellant here has to convince us that the learned trial judge has acted on a wrong principle of law, or has misapprehended the facts, or has for other reasons made a wholly erroneous estimate of the damage suffered.

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[19] Earlier Wan Sulaiman FJ at p. 214 states as follows:

> The learned trial judge preferred the plaintiff's version to that of the defendant's and in these circumstances, it would be wrong of us who have not seen or heard the witnesses, to substitute our own finding for that of the learned trial judge.

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[20] In *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Another Appeal* [1997] 3 CLJ 189 at pp 195-196 Gopal Sri Ram JCA, quoted a passage from, Lord Shaw's judgement in *Clarke v. Edinburgh Tramways Co* [1979] SC (HL) 35 at p. 36 as follows:

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> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgement is entitled to great respect, and that quite irrespective of whether the Judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgement that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstance, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the

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Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgement.

Conclusion

[21] In line with the *dicta* pertaining to the role of the respective courts, it is the conclusion of this court that the judgement under appeal does not contain any error of law or fact or misdirection that would require me to intervene and either set aside or vary the decision of the learned Sessions Court Judge.

[22] It is the conclusion of this court that the learned Sessions Court Judge had not misdirected herself in regard to the facts or law, the burden of proof and the standard of proof. She had carefully and painstakingly considered the oral evidence, the evidence of the IO as well as the silent evidence discernable from the IO's evidence and attached appropriate weight to particular aspects of the evidence. She considered the submissions of counsel for the parties and her conclusions are amply supported by the evidence. Having perused the appeal records and in particular her grounds of judgment, this court is of the opinion that there are neither reasons nor grounds to allow the plaintiff's appeal. The appeal is therefore dismissed with costs.